

LEGAL DEFENCES
TO
COMPULSORY VACCINATION

H. S. SCHULTESS-YOUNG

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LEGAL DEFENCES
TO
PROSECUTIONS UNDER THE
VACCINATION ACTS
AND TO
ILLEGAL VACCINATION

BY
H. S. SCHULTESS-YOUNG
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INTRODUCTION.

THE Amending Vaccination Act of 1871, like the Elementary Education Act of 1873, gives leave to a defendant to appear by any person authorised by him as his representative, not necessarily counsel or solicitor. Such person has a right to address the Court, cross-examine witnesses (54. J.P. 730) and being within the definition of "person" given in the Summary Jurisdiction Act, 1879 (to be construed (sect. 5) with the S.J. Act, 1848, incorporated, except sect. 11, with the Vaccination Act, 1867) a woman is, for the first time for many centuries, accorded the privilege of an advocate. The practice has been established that the defendant may be so represented even if he also is present. 57 J. P. 557. Though a manifestly improper person might be objected to. *Reg. v. St. Mary Abbots, Kensington*, 1891, 1. Q. B. D. 378, and Appl.; 60 L. J. M. C. 52; 64 L.T. 240; 39 W. R. 278; 7 T. L. R. 186, Appl. 248.; 55 J. P. 502.

Who may appear.

First proceedings under sect. 31 not criminal.

The decision of the Court in *Allen v. Worthy* that the application for an order under Section 31 of the Vaccination Act of 1867 is not "a prosecution for neglect to procure the vaccination of a child" (Section 34), leaves it open for the person summoned and his wife to give

evidence, when the application comes before the magistrate. ("I do not understand the word *prosecution*, sect. 34, to mean proceedings before the Justices under the 31st section." COCKBURN C. J. in *Allen v. Worthy*, L. R. 5 Q. B. 163 ; 39 L. J. M. C. 36 ; 21 L. T. (N.S.) 665 ; 34 J. P. 263 and see 57 J. P., p. 557). The summons for disobedience to the order under Section 31 and the summons under Section 29 are, however, "criminal proceedings" within the lines laid down in *The Attorney-General v. Radcliff*, 23 L. J. Exch. 240, and *R. v. Hawkhurst*, 7 L. T. 258, 26 J. P. 772, and vaccination prosecutions not falling within the statutory exceptions, neither the defendant nor his wife are competent witnesses, even as to whether they have a child or not.

Defendant and wife may give evidence on first proceedings under Sect. 31.

"Offence punishable by fine or imprisonment."

I would take this opportunity to point out to those not accustomed to plead for others that neither the Justices nor even the vaccination officers are necessarily their natural enemies, although in the case of the latter the embittering and objectionable practice may exist of paying a fixed fee for every successful vaccination registered. Human nature is highly developed in country magistrates. They have not always precedents and statutes at their fingers' ends, but are men of culture, feeling, and common sense, and their clerks are able lawyers. If their statutory responsibility is made the keynote of the defence, and the discretion, judicial though it may be, open to them by the words "*reasonable excuse*" and "*if he*" (the magistrate) "*shall see fit*" under Sections 29 and 31 is impressed upon them, there are few justices who will not hesitate to inflict punishment on a poorer neighbour only anxious for the welfare of his child. There are, however, methods of conducting a

defence which cannot but prove exasperating to gentlemen not anxious to spend unnecessary time upon the bench, or to listen to points long since decided, or observations a long way from the issue. To avoid this the law should be examined. Shaw's "Vaccination Law" is a most convenient book of reference much used in prosecutions, and for this reason also should be carefully perused. A thorough study of the subject beforehand, with such assistance as this treatise or others can afford, and particularly of the decided cases, will clear the way for the defence, and with good temper, moderation, and conciseness, will show the defendant's argument in the strongest light, and avail much with thinking men for the principles he represents. It is hoped that the defences now indicated will be useful to non-professional as well as professional readers, and for this purpose references and directions have been made as complete as possible.

References have been made in these pages to the opinions of the learned editors of "The Justice of the Peace," Stone's "Justices' Manual," Shaw's "Vaccination Law," &c., on certain points arising out of the administration of the Vaccination Acts. Although of course these opinions will not be binding on the justices no doubt due weight will be attached to authorities so able and impartial.

H. S. S. Y.

TEMPLE, *November*, 1895.

NOTE TO THE SECOND THOUSAND.

It is frequently the case that persons who have no great educational advantages appear as, or for,

defendants. To these I would suggest that objections should be confined (1) to summonses clearly under the wrong section or irregular, and (2) particularly to the "reasonable excuse" pointed out in Part II of this treatise. Rich and poor meet here on common ground. The children of the rich are frequently vaccinated from the children of the poor, and if the public vaccinator ignores "the precautions that are imperatively necessary" he may taint with disease the child of the magistrate on the bench as well as that of the parent before him.

The new point raised in par. 2 has been sustained by the Brentford magistrates (*Ellis v. Reeve*, December 9th and 16th, 59 J.P. 809, see also page 813), after prolonged and careful consideration.

TEMPLE, *January*, 1896.

DEFENCES POSSIBLE.

THE LEGAL DEFENCES POSSIBLE IN PROSECUTIONS UNDER THE VACCINATION ACTS.

It is not necessary in this brief treatise to discuss the use or otherwise of vaccination. Shaw's manual, usually the reference book of justices, devotes the first fifty pages to a defence of compulsory vaccination. Three thoughts are thereby suggested, (*a*) that it is scarcely consistent with the dignity of the law to preface a text-book with an apology for the law; (*b*) that a doubt as to the wisdom of the law follows; (*c*) that colour is perhaps given to the author's notes in respect to prosecutions. The mention of the facts appearing in the Royal Commissioners' 4th Report and Appendices, will be sufficient counterbalance. It is shewn that in Leicester, during ten years ending 1872, 84·3 per cent. of the total births were vaccinated, and that in 1871-3 193 died from small-pox, while it appears from the last (56th) Report of the Registrar-General that in the ten years ending 1891 only 20·1 per cent. of the total births were vaccinated (since reduced, 1893, to 12·9 per cent.), and in 1892-1894 only 14 died from small-pox (both periods being the occasions of highest mortality). An equally significant fact is found in the recently issued (23rd) Report of the Local Government Board, by which it appears that since 1872 there has

been a steadily progressive increase in the percentage of unvaccinated children throughout the whole country as well as the metropolis, and an equally steady diminution of fatal cases of small-pox. The object kept in view in these pages has been to point out the various defences after a summons has been issued, and particularly to indicate how, on the common ground of obedience to the law, those who are opposed to vaccination may make themselves secure from successful prosecution. It is the interest of both those opposed to vaccination and those in favour of it that as much light as possible should be thrown upon the administration of the law. Mere technical objections may do more harm than good, and divert the public mind from the real grievance. They sometimes serve to throw back the costs of abortive proceedings upon the rate-payers, and so cause some comment at the next vestry meeting, but are not to be compared with the moral force of a successful defence taken on the demerits of bad lymph, improper vaccination, and other reasonable grounds of refusal more frequently possible than is generally imagined. However, on the principle that no stone should be left unturned to gain your client's case, the following defences are noted as including those most usually available. It must be remembered that a rough, substantial justice, without too great regard for fine drawn technicality or special pleading, is often characteristic of courts of summary jurisdiction, and evidence will slip through which the finer meshes of the High Court would reject. This must be accepted as incidental to our system of administering the law, and it might be difficult to better it.

I. LACK OF EVIDENCE OF AUTHORITY TO TAKE PROCEEDINGS.—The first question to be asked the vacci-

Guardians' complainants.

The Guardians must direct prosecutions. Schedule pars 1, 6 (c), and Art. 16.

nation officer is, "What evidence have you that the Board prefers this complaint?" For it is the Guardians who primarily make the complaint, and the vaccination officer must be directed and authorised by them (General Order, 1874, Article 16 and Schedule paragraphs 1 and 6). If he produces the minutes of the resolution, duly signed by the chairman, it would be advisable to be satisfied, although it does not appear that the section below is a mere enabling one, and if not the minutes cannot be a complete record, and are inadmissible. (*Porter v. Cooper* 6, Carrington and Payne, 354). The effect of producing the minutes is shown in clause (j) of Schedule I to the Public Health Act, 1875 (the rules of which Schedule are now made applicable to proceedings of Boards of Guardians by the Local Government Act, 1894, sect. 59), viz:—"Any minutes made of proceedings at a meeting, and copies of any orders made or resolutions passed at a meeting, if purporting to be signed by the chairman of the meeting at which such proceedings took place or such orders were made or resolutions passed, or by the chairman of the next ensuing meeting, shall be received as evidence in all legal proceedings until the contrary is proved. Every meeting where minutes of the proceedings have been so made shall be deemed to have been duly convened and held, and all the proceedings thereat to have been duly held." The Guardians prosecute through their officer by 34 and 35 Vict., c. 98 s. 5; they pay costs (Vacc. Act, 1867, s. 28), salary (Vacc. Act, 1871, s. 5), and give authority, as in the case of any other officer appointed by them to take proceeding against any person refusing or neglecting to maintain his wife or family. "*All prosecutions undertaken by the Guardians or their officers or any Registrar,*"—(the Guardians' "vaccination" officer now undertakes all the Registrar's vaccination duties except those under

Guardians prosecute through their officer.

30 and 31 Vict., c. 84, s. 33.

s. 15 of the Vacc. Act 1867. See Vacc. Act 1871, s. 6), as acting for the Guardians under s. 31 or the repealed section 27, "*shall be deemed to be within the operation of 7 and 8 Vict., c. 101, sect. 59, and the Union Chargeability Act, 1865, sect. 9.*" (Vacc. Act 1867, s. 33). The General Order of October 31st, 1874, Art. 2, provides that the appointment of the vaccination officer shall be made in the same manner as that in which the Guardians are required to appoint other officers or assistants, and these are controlled by the Poor Law, now L. G. Board, as other officers of the Guardians (s. 5 of Vacc. Act, 1871). The governing section is 5 and 6 Victoria, c. 57, sect. 17 — "*And be it enacted that wherever a Board of Guardians is empowered to make any order or to prefer any complaint, claim or application before Justices or otherwise, if any such Board resolve to make any such order, or to prefer such complaint, claim or application, a copy of the minute of such resolution, signed by the presiding Chairman of such Board, and sealed with their seal, and countersigned by their clerk or person acting as their clerk, shall be deemed and taken to be sufficient proof of the making of such order or of the preferring of such complaint, claim, application, or otherwise, as the case may be.*"

Guardians ap-
point Vaccina-
tion officer in the
same manner as
other officers.

Poor Law
Amendment
Act, 1842.

Original minutes must be properly kept, not on loose sheets, but in some book provided for the purpose, and signed by the chairman. It would also appear, from the case quoted below, that the original must be signed and sealed also. So strict has been the interpretation of this section that it has been decided that a certificate admittedly signed by the chairman, countersigned by the clerk, and sealed as by "Henry Robert Brayne, presiding Chairman (L.S.)," was

Minutes.

insufficient, and no proof that the original certificate had also been signed and sealed, for the sealing was not expressed as the common seal of the Guardians affixed at a meeting of the Board. *Reg. v. Farthinghoe* 1 New Sessions Cases, 238. (See note to 5 & 6 Vict., c. 57, s. 17, Glen's "Poor Law Statutes.") This part of the section, repeated in effect in 7 and 8 Vict., c. 101, sect. 69, provides as to what shall be evidence of the making of any order by the Board, or the preferring of any complaint, and does not touch the manner of authorization dealt with in the rest of the section. To comply with the law it would be necessary to produce both evidence of the making of an order or complaint by the Board, whether general or special, and also the sealed and signed authority to the officer of the Board to appear in support of it, but these may be combined in one document.

2. LACK OF AUTHORITY TO TAKE PROCEEDINGS.—The next important question to be put to the vaccination officer in cross-examination is, "By what authority do you prosecute?" The next will be, "Do you produce it?" If not, the proceedings should fail, for the reasons below, so also if he produces minutes, or directions, or anything less than the following explicit authority, viz., "*An order in writing under the hand of the presiding chairman of such Board (of Guardians), and sealed with the common seal of such guardians.*" The steps are quite clear that lead up to this argument. By the Schedule to the General Order of 31st Oct., 1874, the duties of a vaccination officer are set out (6, a.b.c.) that if on "*personal inquiries the parent be found in default an exact date should be specified by which he must have complied with the law and a Notice (B), or to the like effect should be given. Failing compliance the vaccination officer shall*

See page 9.

proceed according to the directions of the guardians given him under Art. 16," "authorizing the vaccination officer to institute and conduct such proceedings." Now, admitting the directions, the "authorization" is defined by the Poor Law Amendment Act 1842, 5 and 6 Vict., c. 57, sect. 17, to be as follows:—
"In all cases in which the guardians of any parish or union are or may hereafter be empowered to make any application or complaint or to take any proceedings before any justices at petty, or special, or general quarter sessions, it shall be lawful for any officer of such guardians, empowered by any board of such guardians by an order in writing under the hand of the presiding chairman of such board, and sealed with the common seal of such guardians, to make such application or complaint, or to take such proceedings on behalf of such guardians as effectually to all intents and purposes as if the same were made or taken by such guardians or any of them in person." See Stone's "Justices' Manual" (1895), p. 409, "Guardians: how authorised to take Legal Proceedings." It strengthens and explains the argument if the usual form is produced, which runs as follows:—

Statutory obligation.

THE Guardians of the Poor of the ——— Union
 DO HEREBY ORDER AND EMPOWER (name, address),
 being an Officer of the said Guardians, to take proceedings before the Justices in Petty Sessions, against (name or names), and to take such other proceedings in the said matter, on behalf of such Guardians, as may be necessary.

IN TESTIMONY WHEREOF the Common Seal of the Poor of the said Union and the hand of the Presiding Chairman of the Board thereof, are hereunto affixed and set at a meeting of the said Guardians held (date).

————— Presiding Chairman of the said
 Board of Guardians.

————— Clerk of the Guardians.

(L.S.)

This brings us back to Art. 16 of the General Order of 31st Oct., 1874, and the manner prescribed in sect. 17 of the Act of 1842, for the giving of directions and authorization. I see nothing inconsistent in the foregoing with any orders issued by the Local Government Board. The circular letter, dated 31st October, 1874, accompanying the order, states that "the Guardians may give special directions in each individual case of default, or they may give such general directions as will enable the vaccination officer to take proceedings, in the first instance, in every case of default, without referring it to them." This letter may be read so as to overstep the law; it is true the directions may either be individual or a number of names may be included in one authority, but it is clear they cannot be anticipatory. The vaccination officer is practically *pro tempore* counsel or solicitor instructed by the Guardians to prosecute under s. 17 of the Poor Law Amendment Act above quoted. It will, however, be noted that the powers of the Local Government Board can only "extend to and include the making of rules, orders and regulations, prescribing the duties of guardians and their officers in relation to the institution and conduct of proceedings" not inconsistent with the law (such as the Instruction for Vaccinators under Contract, page 34, the duties of vaccination officers, &c.). This was the view expressed by the Right Hon. Charles T. Ritchie, President of the Local Government Board, who said, in the House of Commons (Feb. 17, 1888), in reference to the General Order of the Local Government Board, that "it was a matter entirely within the discretion of the Board of Guardians to exercise their jurisdiction in such matters in the way they thought best," Hansard, 3rd series, 322, p. 713. (See also definition of powers of L.G.B. under 37 and 38 Vict., c. 75, sect. 1).

3. LACK OF APPOINTMENT.—A highly technical objection is sometimes taken that the vaccination officer should prove in the words of the section before recited that he is an “*officer of such guardians*,” since it is only to such an one can the specified authority be given. In the case of *Knight v. Halliwell*, 43 L. J. M. C. 113, 30 L.T. (N.S.), 359; L. R. 9 Q.B.D. 412; 22 W.R. 689; 38 J.P., 420, it was decided that the prosecuting officer was proved to be a duly appointed registrar (now vaccination officer) by the production of the minute book, but what were the instructions given in the minutes, referred to *en passant* and with some doubt, by Mr. Justice Blackburn does not appear. Much less would have proved the *prima facie* due appointment of the vaccination officer. The mere fact of his acting in that capacity is presumptive proof of his appointment. (*M’Gahey v. Alston*, 2 M. and W. 206; Best on Evidence, “Presumptions,” 8th ed., p. 332; Starkie on Evidence “Character.”) It need not even be in writing (*Reg. v. Greene*, 21 L. J. M. C. 137, 17, Q.B. 793), except to bind the guardians, but there should be a record of it on the minutes, and if it is produced, and states to be for any fixed time and salary, it should be under seal (*Dyte v. St. Pancras Union*, 27 L.T. (N.S.) 342, and if made before 14th June, 1875, must be stamped (see 38 Vict., c. 23, sect. 14—£100 yearly salary £2, £150 £4, £200 £6, &c.) If the appointment also assumes to give general anticipatory authority to take proceedings it must of course be produced. It can only be a general authority at the most, of more than doubtful legality as previously shown (par.2). In second prosecutions under section 31 of the Vaccination Act the authority must be special and individual in each

case (Art. 16, Gen. Order 31st Oct., 1874), and cannot be contained in the appointment.

4. BAD APPOINTMENT.—If there is reason to suppose that this is the case, either as regards the vaccination officer or the public vaccinator, the mode and condition of appointment of officers by boards of guardians should be considered (see “Glen’s Poor Law Orders, Art. 155,” *et seq.* also General Order 31st Oct., 1874, Art. 7). It must, however, be noted that illegal election or disqualification of any of the Guardians does not invalidate their proceedings. (Local Government Act, 1894, sect 59; and sect. 199, schedule I. of the Public Health Act, 1875).

5. SECOND PROSECUTIONS UNDER SECTION 29.—

These are entirely illegal. In the case of *Black v. the Guardians of the Epping Union*, 49 J.P., 19; 78 L.T.R. 133, a strong Court of three Judges decided that only one prosecution in respect to the same child can be instituted under this section. The case of *Pilcher v. Stafford*, 33 L. J. M. C., 113; 28 J.P. 88; 9 L.T. (N.S.) 759; 12 W.R. 407; 10 Jur. (N.S.) 651; 4 B. & S. 775 still rules prosecutions under section 29.

Decision of
Grove, Hawkins
and Smith, J.J.

6. SECOND PROSECUTIONS ON THE SAME ORDER TO

VACCINATE.—Under section 31 any number of prosecutions for omission to vaccinate the same child is possible, but after the magistrate has made the order one summons only to enforce each such order may be issued. “*A second order is necessary,*” LAWRENCE, J. “*There is nothing within the language of the section which makes disobedience to an order for the vaccination of a child a continuing offence,*” WRIGHT, J. (*Reg. v. the Justices of Portsmouth*, 1 Q. B. D. (1892) 491; 61 L. J. M. C. 126;

Only one sum-
mons can fol-
low each order.

66 L.T. 677; 40 W.R. 413; 8 T.L.R. 33 (Q.B.D.), 56 J.P. 149). One order, one summons, is the inflexible rule. The note on page 62 of 55 J. P. is therefore erroneous.

7. SECOND PROSECUTIONS UNDER SECTION 31 NOT SPECIALLY DIRECTED.—The summons to enforce the order to vaccinate under this section is not a further proceeding requiring the special directions of the guardians to prosecute, but after an order has been made, and summons issued and dealt with under section 31, any further prosecution (in respect to the same child) must be specially authorised and directed by the guardians, “*but no such directions shall authorise the vaccination officer to take further proceedings under section 31 of the Vaccination Act of 1867 in any case in which an order has already been obtained and summary proceedings taken under that section until he shall have brought the circumstances of the case under the notice of the guardians, and received their special directions thereon*” (General Order Oct. 31st, 1874, Art. 16). The meaning of this is that after an order is made under section 31 the defendant may be summoned once only for a penalty for disobeying the order, unless his case has been duly considered by the guardians, and a special direction to prosecute been given to the vaccination officer. In the words of Mr. Justice Mathew, “*It was once decided that there might be successive orders imposing fines upon a man for persistent refusal to have his child vaccinated. This was thought to be too oppressive.*” Hence the clause in Art. 16 of the General Order, 1874. *The Queen v. Brocklehurst*, 1 Q. B. D., 1892, 565; 61 L. J., 48, 40, W. R. 64, 56 J. P. 182, 65 L. T. 714; 8 T.L.R. 25 (Q.B.D.). “*The intention is that the guardians should consider with regard to each individual case*” (i.e., person proposed to be summoned) “*the effect which a continuance of*

Both special
authorisation
and direction
is necessary.

the proceedings is likely to have in procuring the vaccination of the individual child and in ensuring the observance of the law in the union generally." (Local Government Board to Evesham Guardians, 17th September, 1875, Parliamentary Paper 110, 1876, Shaw's "Manual," 5th ed., p. 190). The wording, both of Art. 16 of the Gen. Ord. 1874, and the letter to the Evesham Union, is quite consistent with the reading that the previous proceedings under sect. 31 need not have been in respect to the same child. Clearly the spirit of both of these is in favour of this view, for the words are outside of legal technicalities, and deal simply with the probable effect of further proceedings upon a parent, who, on principle, has made a previous stand against vaccination. It is absurd to suppose, *e.g.*, in the case of twins, that the parent should be summoned twice under sect. 31, once for each twin, before having his case specially considered, while his neighbour with one child is summoned once only. The phrase "each individual case" cannot be taken to mean each individual child. If it can be established to the satisfaction of the magistrates, by the evidence of one or more of the guardians, or some person present at the time when the authority to prosecute was signed, that no "careful consideration" was given to each case either on the lines laid down above or otherwise, it would clearly be open to the magistrate to dismiss the summons.

The vaccination officer should be carefully cross-examined as to the fact of his having brought the circumstances of the case before the Guardians, and what those circumstances were. This is an actual example of the kind of witness one now and then rejoices in:—

Q. : What circumstance of the case did you bring before the Guardians?

Cases of pa-
rents object-
ing.

A. : I told them the child had not been vaccinated.

Q. : Beyond the fact that the child had not been vaccinated, what circumstance did you state ?

A. : I told them the father wouldn't have it done !

8. NON-PRODUCTION OF SPECIALLY DIRECTED AUTHORITY, IN PROSECUTIONS OTHER THAN THE FIRST.—If on cross-examination of the vaccination officer the authority is not produced, or if produced not in accordance with 5 and 6 Vict., c. 57, sect. 17 (see par. 1), not specially directed against the individual case, there must be an adjournment, with costs against the guardians. It would clearly appear, from the unqualified wording of Art. 16 of the General Order above referred to, that it matters not whether the first prosecution under section 31 has taken place in the same parish as subsequent prosecutions. The same rule will apply to an attempted second prosecution under section 29 (see par. 5).

Special authority to be given by Guardians to their officer

9. BAD SERVICE.—The procedure as to issue and service of summons is regulated by 11th and 12th Vict., c. 43, read together with the Summary Jurisdiction Act of 1879. These are usually called Jervis' Acts, and, with the amending and consolidating Acts of 1881 and 1884, should be carefully studied by all persons desirous of appearing "to make full answer and defence" for themselves or others. If the summons is left with some person under 16, or is not explained to the person with whom it is left, or *a fortiori* if the person with whom it is left is *non compos mentis*, or was intoxicated at the time, or it was explained to the officer or other person serving

Jervis' Act

it that the party summoned was away, and the summons could not reach him, the service will be bad. *Re William Smith*, 32 L. T. R., 394; 23, W. R., 523; 39, J. P., 292, (Note 613), L. R. 10 Q. B. D., 608; *Smith v. Ewen*, 39 J. P., 724; *R. v. Hall*, 6 D. and R. 84. The wife may appear and explain this, but if the defendant himself comes forward the defect in service will be cured, and the point lost. *R. v. Hughes*, 4 Q. B. D., 614; 43 J. P. 356; *Gray v. Commissioners of Customs*, 48 J. P. 343. For other notes see "Glen's Summary Jurisdiction Acts" under the reference to "Service of Summons."

10. IRREGULARITY.-- A good ground of objection may be taken to proceedings under section 31 if the Justice under whose signature the summons is issued does not sit on the bench to hear it (Stone's "Justices' Manual," 1895, p. 1052, note c.). The express language of section 31 takes it out of the Summary Jurisdiction Act, 1848, sect. 29, even though by section 33 the Acts must be read as one. To proceedings under section 29 this objection of course does not apply, since by the S. J. Act, 1848, one Justice may issue and another hear the summons, Stone's "Justices' Manual," 1895, p. 1052; but as to waiver of objection by appearance of defendant see *R. v. Fletcher*, 48 J. P. 407, 51 L. T. 334, 32 W. R. 828, also note *R. v. Hughes*, 4 Q. B. D. 614, 43 J. P. 556, and *Gray v. Commissioners of Customs*, 48 J. P. 343. For the same reason the Justice who receives the information must issue the summons, but if the order to vaccinate under sect. 31 has been made, the S. J. Acts regulate the proceedings, and any Justice may issue the summons, and any other two Justices hear it.

Under s. 31 the same Justice who signs summons must hear it.

II. NON APPEARANCE OF DEFENDANT TO SUMMONS

UNDER SECTION 31.—The magistrate may nevertheless make the order on a parent duly summoned. *Reg. v. a Justice for Cinque Ports*, (*Reg. v. Crawford*) L. R. 17 Q. B. D. 191; 55 L. J. M. C. 156; 34 W. R. 789; 50 J. P., 228; 11 and 12 Vict. c. 43, sect. 13. Summonses are sometimes served and prosecutions under taken without the vaccination officer being able to prove service on the proper person, or that the person served has any unvaccinated child under his control. Unless this can be shown the summons must fail, but any evidence on this point, however slight, will usually satisfy the magistrate. In taking this technical ground it will be necessary to walk softly, and plant each footstep firmly. It should be urged that while under the repealed Act of 6 and 7 Will. IV, c. 86, an entry in the registry of births used to be held as evidence that the birth took place before the date of the entry, but not evidence of the day of birth, the Births and Deaths Registration Act of 1874, c. 88, sect. 38, provides that a certified copy of an entry signed by the Registrar (or deputy superintendent) who certifies the register to be in his lawful custody, is only admissible evidence of the birth if the entry purports to be signed by the prescribed informant, viz.: the father or mother of the child. If they fail, the occupier of the house in which the birth occurred, a person present at the birth, or the person having charge of the child may register the birth. *The Queen v. Weaver*, 38 J. P., p. 102. The prosecution has to make out the case against the defendant, and must prove, though only circumstantially, that the child is within his custody or control. By reference to Art. 6 of the General Order of 31st Oct., 1874, it will be seen that it is the duty of

Reference to
Jervis' Act.

the vaccination officer to make "*personal* inquiries" in respect to any child not vaccinated after notice. These inquiries (the word "*personal*" being in italics), are there stated to be for the purpose of obtaining the necessary certificate, or of taking proceedings, and by reference to Article 2, to discover whether the child whose name appears in the register of births is still alive. If he goes before the Justices without having made these inquiries, and thereby unable to state any reason for believing whether the child was alive or dead at the time the information was laid, the prosecution should fail, for even in prosecutions under the Vaccination Acts the presumption of law is that every man is innocent till proved guilty, and his offence must be established before his conviction can follow.

12. OUTSIDE THE LIMIT OF AGE.—The compulsory clauses of the Vaccination Acts only apply in respect to children between the ages of three months and fourteen years (sections 29 & 31), therefore it is a good defence if it can be proved that the child is of less age than three months or more than fourteen years. This may be proved either by the entry in the register of births (see above), or on the evidence of some person (other than the parents except in first proceedings under sect. 31, when either or both of them may give evidence) present at the birth. It is a good defence to proceedings under section 29 if it can be proved that the child was fifteen months old when the information was laid, since by section 16 of the Act of 1867 the parent is bound to have it vaccinated within three months of its birth, and by section 11 of the Act of 1871 any complaint must be made or information laid within twelve months from the time

Only children between the ages of three months and fourteen years are subject to compulsory vaccination.

when the matter of the complaint or information arose. "*The period of limitation is to run from the time when the cause of complaint first arose.*" (LUSH, J., in *Knight v. Halliwell* (see par. 3). This even applies to the metropolis. (*Miller v. Rhind*, 29 L. T. (N. S.) 29 ; 37 J. P. 376). An exception to this rule is when under section 12 of the Act of 1867 the attendance of the public vaccinator is made at wider intervals than three months by reason of the scanty population. The time when the cause of complaint arises will then be found by the section to be fixed as "*Before the commencement of the next interval.*"

It may here be noted that by Section 16 of the Act of 1867 a person having the custody of a child "*By reason of the death, illness, absence, or inability of the parent or other cause, shall, within three months after receiving the custody of such child,*" have it vaccinated, but if through any unfortunate circumstances the child has been passed from one person to another, no one would seem to be liable under the 29th section, so long as each transference is within the three months, though a parent or any person having the custody of the child would be liable under the 31st. and sect. 11 of the Vaccination Act of 1871.

13. WANT OF JURISDICTION.—This is a point which should not be overlooked. If the parent is not within the district for which a vaccination officer acts when the information is laid, this will be a good defence under section 29, but merely walking out of the district and back again is not enough ; the move must be residential, and must be proved by other testimony than that of either husband or wife if the contrary is asserted by the vaccination officer. But "*Proceedings under section 31 may be taken and proceeded with if either the child*

or its parent was within the union or parish for which a vaccination officer acts at the time of the information being laid.' (Vaccination Act, 1871, section 11). It is necessary that the child or its parent should have been within the union or parish when the information was laid, otherwise there can be no jurisdiction. Evidence should be given to prove this. 49 J. P. 684.

14. WRONG SECTION.—Thanks to the little encouragement vaccination officers are afforded to make themselves familiar with the law, and the immunity which frequently attaches to the most irregular practice, this defence is very often available. At the foot of the summons the section is (with other matter) indicated; that under section 29 being often marked A 2, and that under section 31 B 2, while a summons for disobedience of the order to vaccinate made under section 31 is marked B 5. It even now not rarely happens in remote districts that defendants who should have been summoned under section 31 are summoned under section 29. (See "*Outside the Limit of Age*," par. 12). Omission to vaccinate, even after order made, is not a continuing offence. (*R. v. JJ. Portsmouth, ante*, see par. 6). See 55 J. P., p. 351.

15. DEFAULT OF NOTICE.—It may be "*a reasonable excuse*" under section 29, and an absolute defence under section 31, if no notice to vaccinate has been sent to the parent. It is not necessary, in any prosecution under these Acts, to prove that notice has been received (section 34) by any defendant, and it must be noted that first proceedings on summons, under sect. 31, are expressly stated not to be a prosecution, but a book open to public search must be kept in which the registrar shall enter minutes of the notice (section 24).

This book should be produced in Court, if so demanded, but it is useless to waste time by pleading that the notice has never been received, if there is an entry of its having been duly sent. But it would appear that if the party "*To whom notice is given be unable to read, the registrar must make him or her acquainted with its contents by verbal explanation, stating the requirements of the law as to vaccination, and the penalty attached to their non-fulfilment.*" (Regulations for Registrars of Births and Deaths). A first notice under section 31 may be sent by post (Gen. Order 1871, Art. 6), but the second notice must, if sent by post, be proved to have reached the parent. 52 J. P. 62. The Tunbridge Wells magistrates decided in *Tunbridge Guardians v. Kemp*, June 24th, 1895, from which decision I respectfully dissent, that if a notice other than the first is delivered requiring compliance with the law within, *e.g.*, fourteen days, the vaccination officer may nevertheless take out a summons against the same party in respect to the same child before the expiry of the term named on the notice, which is equivalent to saying, "Unless you pay me what you owe me by Saturday I shall sue you," and then taking out a summons the very next day, a practice, to say the least of it, unworthy of the law and contrary to the spirit of the Schedule to the General Order of October 31st, 1874. Although a parent may be prosecuted over and over again under section 31, subject to provisions noted under the heading, "Lack of Authority to take Proceedings," there must be a fresh notice given every twelve months if the old one has been disregarded. (*Knight v. Halliwell*, *ante*, par. 3). Thus a notice entered as delivered on June 1st to have a child vaccinated on or before June 15th creates the cause of complaint as dating from June 15th, and if there is no further

Notice must
be renewed
yearly.

notice a parent cannot be prosecuted after twelve months from that date. Of course it is too late to issue a notice when once the time has been allowed to lapse under section 29. (See section 11 of the Summary Jurisdiction Act of 1848, twelve months being substituted by the Vaccination Acts for the six months therein specified). There is nothing to prevent proceedings being taken under section 31, but a fresh notice must be given every twelve months.

16. OMISSION TO SERVE ORDER.—If an order under section 31 to vaccinate is made when defendants appeared in person, it is the opinion of the learned editor of "The Justice of the Peace" that proceedings should not be taken until after the expiration of fourteen days from the date when the copy of the order was served, irrespective of the date of the order. 53 J. P. 253. (See *re Bowdler*, 17 L. J. R. 242 Q. B., overruling *re Fletcher*, 13 L. J. M. C. 16.

17. ABSENCE OF PUBLIC VACCINATOR.—It would probably be a good defence if, on taking or sending the child down to the vaccination station at the hour appointed, and after waiting a reasonable time, say half an hour, the public vaccinator did not put in an appearance, but this would be required to happen on the first and every attendance at the station after delivery of notice within the time (usually fourteen days) limited by it (and see 59 J. P. 495). It has happened that a parent having disregarded the notices to have his child vaccinated for twenty months, the Justices made an order under section 31 that the child should be vaccinated within fourteen days. No public vaccination was held in the district within this period, yet the parent was summoned and convicted for disobedi-

ence to the order, and the conviction affirmed on appeal, Coleridge, C. J., remarking that the defendant had had previous ample opportunities of complying with the law. (*Francis v. Smith*, 58 J. P. (1894), p. 429).

18. PREVIOUS VACCINATION.—I allude to cases brought under my notice of imperfect vaccination or evasive vaccination. There is no definition of vaccination, and the certificate of a registered medical man is conclusive under section 29, though under section 31 the magistrate has absolute discretion to accept the plea or not, and may regard the child as unvaccinated if he think fit. The only bar to his doing so under section 29 would be the certificate above mentioned, and if it were not previously transmitted to the vaccination officer, he could fine a defendant 20s. for the omission, under the Vaccination Act, 1871, sect. 11.

Vaccination
undefined

19. PREVIOUS ATTACK OF SMALL POX.—This is a good defence, though a rare one, and the medical certificate (see next paragraph) or other evidence need not be transmitted to the vaccination officer as other certificates must be under pain of a penalty. (Vaccination Act, 1871, section 7), *Broadhead v. Holdsworth*, 25 W.R. 306, 46 L.J.M.C. 172; L.R. 2 Ex.D. 321; 36 L.T. (N.S.) 320; 41 J. P. 327-353).

20. POSTPONEMENT BY MEDICAL CERTIFICATE.—A certificate given by any registered medical man (see section 35, and *Cromack v. Brennand*, 37 J. P. 276) before issue of the summons that the child is unfit for vaccination, or is unsusceptible, or has had small pox, or has been duly vaccinated, is an absolute defence, whether given in *bona fide* or not, to proceedings under section 29, but only so at the discretion of the magis-

trate to proceedings under section 31, even if the medical man is called into the witness box to support his certificate. This applies even after summons issued, though the defendant may be subject to a fine for failure to transmit the certificate under section 30 of the Act of 1867, and section 11 of that of 1871, (46 J. P., p. 154). It has been held that section 34 should be read directly after section 29, but the lay mind will probably be unable to follow the reasoning of the learned Judges who have expounded the law to be that neither of the proceedings under section 31 is a prosecution for neglect to procure the vaccination of a child. The public, as well as the profession, must accept this interpretation until it has been re-interpreted. The leading case should be carefully perused (*Allen v. Worthy*, L.R. 5 Q. B. 163; 21 L.T. (N.S.) 665, 39 L. J. M.C. 36; 34 J.P. 263. Except strictly within the provisions as to certificates within the Acts—viz., certificates of postponement under sections 18 and 19, certificates of insusceptibility or previous small pox under section 20, and of successful vaccination under sections 21 and 23—all medical evidence may be required to be given in open Court. Thus, if a defendant pleads that his child is subject to eczema, and that his family have a constitutional tendency to that disease, he must produce a medical man or other person in the box who can give evidence thereof, and be cross-examined if required. An experienced medical man and some person who can testify as to the susceptibility of the defendant or his wife to eczema, and particularly that the child is liable to it, should come forward. The decision is one evidently in the magistrate's discretion, and therefore the best evidence should always be laid before him.

21. REASONABLE EXCUSE.—This should be read with

the preceding. Mere conscientious objection to the policy of the Legislature is not enough, although it need not be forgotten that the Vaccination Act of 1871 contained a clause on the recommendation of a Select Committee that only one full penalty of 20s. should be inflicted in respect to the same child, and that this clause passed the Commons, and was only rejected in the Lords by a majority of two. Objections must be supported by facts which can appeal to the impartial judgment of the magistrate, who has but to administer the law. Unfortunately a magistrate has been known to step down from his official seat to express his private opinion of the wisdom of the law his duty is to administer. This may give rise to a deplorable belief that the case is prejudged, and tends to diminish that confidence with which every defendant should approach the Bench. The "reasonable excuse" is not so limited as indicated in the notes to section 29, in "Shaw's Manual," for it is decided that general arguments may be used as a ground, among others, of refusal to vaccinate a particular child when it would appear that under the circumstances it might be dangerous to have the child in question vaccinated. To support any such argument the Reports of the Royal Commission on Vaccination may be read, and the points taken. The leading case in this respect is *Rutter v. Norton* (*Times*, 3rd November, 1892, 57 J. P. 8; Stone's "Justice's Manual," 1895, p. 1051). The case was stated as follows:—"The appellant" (the father) "pleaded as a reasonable excuse that he believed that vaccination would prove injurious to his child, and that his family had a tendency to injury from vaccination. The appellant contended that he was entitled to render as a reasonable excuse that he believed that vaccination would be injurious to his child, and to advance any

General argument applied to particular child permissible.

Rutter v. Norton.

Judgment.

arguments and prove any facts in support of this belief, and to read extracts from the evidence contained in the printed proceedings of the Royal Commission on Vaccination and extracts from medical and statistical works, and to comment on them." After argument, judgment was delivered for the appellant by Pollock, B. and Hawkins, J. who said :—"The Justices say that they declined to hear any argument of the appellant in support of his plea that he believed vaccination would prove injurious to his child, and even if his arguments and evidence also tended to show that all vaccinations were wrong he still was entitled to be heard so far as his own child was concerned." The attention of the Justices should also be called to the following precedent, which is referred to with approval in 57 J. P. 812. On a summons under section 31 no evidence was called to prove the child was unfit or unsusceptible, but it was elicited, on cross-examination of the vaccination officer, that the defendant had been proceeded against once before in respect to the same child, and three times in respect to another. It was also submitted that by the utterances of responsible Ministers the Government intended to bring in a measure to prevent repeated prosecutions. The Justices held this to be a reasonable excuse, and dismissed the summons. The *interim* Report of the Royal Commissioners advising such a measure might be added to the argument.

SUBSEQUENT PROCEEDINGS FOR ENFORCEMENT OF PENALTY.

I. ABSENCE OF SERVICE OF COPY ORDER.—A commitment is illegal if the defendant is not served with a copy of the minute of such order before any warrant of commitment or of distress is issued. It is of course sufficient if a signed and sealed copy of the order itself is served, but neither minute nor order so served may form any part of the warrant of commitment or distress. The seal need not be waxen; an impression is sufficient. *Reg. v. St. Paul, Covent Garden*, 7 Q. B. 232, 9 J. P. 441. It is no argument for omitting this service that the defendant was in Court, and heard the order made. The section is imperative. (11 and 12 Vict., c. 43, sect. 17). The order may be made verbally on one day, and the copy, minute or order served on the next. *Ratt v. Parkinson*, 20 L. J. (N. S.) M. C. 208; 15 J. P. 356.

S. J. Act, 1848.

2. CIVIL DEBT.—It is sometimes urged that the costs under the order to vaccinate, section 31 of the Vaccination Act, 1867, can only be recovered as a civil debt, but section 18 of the S. J. Act, 1848, has been urged as not open to this construction. "A civil debt," within section 6 of the S. J. Act, 1879 (42 and 43 Vict., c. 49), "is a sum of money claimed to be due" before the commencement of proceedings to recover it. "Stroud's Judicial Dict., 1890," p. 130 (*R. v. Paget*, 51 L. J. M. C. 9; 8 Q. B. D. 151). On the other hand the decision in *Kennard v. Simmons*, 50 L.T. (N.S.) 28; 48 J.P. 551; 15 Cox C.C. 397, clearly indicates that the distinction must be taken as between a conviction (such as under sect. 29) and an order (such as under sect. 31).

Distinction between a conviction and an order.

11 and 12 Vict.,
s. 43. See ss. 1,
14, 17 and 18.

A fine by a
magistrate in-
dicates com-
mission of a
crime. *R. v.*
Hawkhurst, page
4 ante.

See also *Regina*
v. Kerswell, 64
L. J. R. M. C. 70;
1 Q. B. (1895) 1;
74 L. T. (N. S.) 574

LINDLEY, J., in his judgment said:—"The 20/- ordered to be paid was money adjudged to be paid on conviction, and was not money simply ordered to be paid. The difference between conviction and an order for the payment of money runs through the whole magisterial law and through the whole of Jervis's Act. Sect. 21 of the S. J. Act, 1879, mentions a sum not a civil debt adjudged to be paid by an order. The object apparently was to extend sect. 4 of the Debtors' Act, 1869, which excepts from its provisions, all sums recoverable summarily before justices, so as to include in future all sums recoverable summarily under, or by virtue of an order. But this modification does not apply to sums payable on *convictions* as distinguished from orders." An order to vaccinate under section 31 can carry no penalty and cannot include order to pay the expenses of the time of the vaccination officer, for he is paid by the parish, and it is difficult to understand what costs can ordinarily be adjudged, except the cost of summons and service. Such as they are, however, they can only be a civil debt under the above decision.

3. IMMEDIATE COMMITMENT.—There is a mistake often made as to the Justices' power to make an order for commitment without issuing a warrant of distress, but if either the defendant asserts that he has no sufficient goods, or the Justices believe it would be ruinous to the defendant and his family to issue distress, they may, by section 19 of the S. J. Act, 1848, commit him as a criminal prisoner without hard labour. (*Kennard v. Simmons*, ante). Before this is done a copy of the minute must be served as above, and must not form any part of such warrant of commitment (section 17 of S. J. Act, 1848).

4. ORDER ULTRA VIRES.—It is a good ground of appli-

cation for a rule of certiorari if a conviction for disobedience under section 31 includes the costs of the previous order to vaccinate, even if the magistrates were silent as to the costs when the order was made, for this is, in effect, "no costs" on the order, and they cannot be added to the order for a penalty. (59 J. P. 94).

No costs

5. ILLEGAL DISTRESS.—The only course for an officer to adopt if another person has a joint interest in the goods of the defendant is to make a return of no effects, otherwise he will be liable in damages if he makes a distress on another person's goods, even if not informed that they were not the property of defendant. (56 J. P. 668). For remedy see page 42 *post*.

6. COSTS GRANTED ON DISMISSAL.—Magistrates sometimes question their powers to grant costs when the summons is dismissed, except when the defendant is "improperly" brought before them. (Section 31). *The Summary Jurisdiction Act*, 1848, sect. 18, applies, in spite of the section, which is only general, and unnecessary. (See 58 J. P. 272).

7.—COSTS GENERALLY.—These vary, but can only be a few shillings for court fees, &c. The vaccination officer and constables are paid otherwise. There can be no costs with a fine of under 5s. unless specially directed at the time (S. J. Act 1879, s. 8). The Justices must in every case ascertain and fix the costs, and not delegate the duty to some one else, or the conviction will be bad. *R. v. St. Mary, Nottingham*, 13 East 57; *Sellwood v. Mount*, 9 C. and P. 75; 1 Q. B. 726.

8. JUSTICES INTERESTED.—The conviction will be bad if either or any of the Justices hearing and adjudicating is the public vaccinator or a member of the

Board of Guardians ordering a prosecution, but not if he only "happens" to be elected. (*R. v. Field*, *Times*, Q. B. D., June, 1883). Justices are no longer (L. G. Act, 1894, sect. 20) *ex officio* Guardians, and the question is one of substance and of fact, and only if the adjudicating justice is shown to have taken an active and actual part in the prosecution can the conviction be quashed.

CERTIORARI.—This is done by application to the Queen's Bench Division, and is the only proper course when the jurisdiction of the Justices is questioned or the Bench illegally constituted as above instanced. (1, 4, 7).

STATING A CASE.—This is a means of taking the opinion of the Queen's Bench Division of the High Court on the Justices' decision on points of law, but not of fact. For instance, a case has been stated as to whether a defendant might read extracts from the Royal Reports on Vaccination, and address the Court with general arguments that vaccination would be injurious to his particular child. The Justices decided he might not, but on their stating a case the Court above decided that he might. On the other hand, no case can be stated if the Justices find, as a matter of fact, that vaccination would not prove injurious to the child in question: a grave responsibility for them to undertake, though if they are mistaken, and injury follows the vaccination of the child, the parents have no remedy against them.

Rutter v. Norton.

If any case is pursued beyond the jurisdiction of the magistrates, the Vaccination Acts do not permit of any layman but the defendant himself acting in the matter, and the technicalities and difficulty of procedure necessitate the services of a solicitor.

PART II.

ILLEGAL VACCINATION.

THROUGH long years of immunity from supervision, public vaccinators frequently perform their duties illegally, and herein lies a legitimate defence to a summons under section 29 and summons for disobedience to order under section 31. Armed with the weighty authority of an Order in Council (July 29th 1871), the Local Government Board at Whitehall have for years past issued imperative directions to all public vaccinators as to the performance of their duties. (General Orders substituting instructions for vaccinators, February 28th, 1887, *London Gazette*, 1887.) "This order embodies the instructions to be observed by all public vaccinators and it is designed both to secure the performance of good vaccination, and to indicate the precautions that are imperatively necessary to bring the operation to a safe conclusion." Shaw's "Manual," 1887, p. 12. For these "Instructions" see p. 155.

Superseding
Order of Dec.
1, 1859.

Imperatively
necessary.

Production of the *London Gazette* containing the order is *prima facie* evidence of any order or regulation, or a copy purporting to be printed by the Government printer or certified to be true by any member of the L.G.B., or secretary or assistant secretary (31 and 32, Vic. c. 47, sect. 2.)

These instructions wisely drawn and necessary if risk of spreading disease is to be avoided, consist of a series of directions and provisions that each public vaccinator "shall" vaccinate only under certain restrictions, and having made searching enquiries as to the fitness of each case. These instructions are systematically ignored by public vaccinators throughout the country, a rapid "Which arm will you have it on?" being as a rule the only question asked. Yet these are the men who most loudly demand obedience to the law. So careful have been the sensible and scientific advisers of the Local Government Board to safeguard the children of the poor from possible contagion, that if the law is carried out in its integrity, public vaccinators will not find their posts the easy introduction to private practice they may be accustomed to regard them. In some twenty test districts in which enquiries have been lately made there appears to be an universal disregard of these imperative instructions; herein lies a good and sufficient ground, when proved before the magistrate, for refusal to submit any child to such vaccination.

The following are the instructions imposed upon all public vaccinators as regard infants.

(1.) "Ascertain that there is not any febrile state."

"Nor any irritation of the bowels."

"Nor any unhealthy state of the skin."

"Especially no chafing, eczema behind the ear, or in the groin, or elsewhere in the folds of the skin."

"Do not, except of necessity, vaccinate in cases where there has been recent exposure to the infection

of measles or scarlatina, nor where erysipelas is prevailing in or about the place of residence."

(3), (4), (5.) After the minutest directions respecting the protection of vesicles, the entry of cases and an instruction that liquid lymph directly from arm to arm should be used to maintain a succession of cases the very necessary caution is added that stored lymph may "become inert or otherwise unfit for use."

(6). The public vaccinator is further cautioned, "Consider yourself strictly responsible for the quality of whatever lymph you use or furnish for vaccination," and (7) stringent regulations are laid down that he shall take no lymph from doubtful subjects or re-vaccinated cases, nor from any vesicle round which there is "any conspicuous commencement of areola" (brownish ring.)

The 8th instruction recognises the possibility that in spite of all precaution the lymph employed may be of impure origin, and the vaccinator is directed to "Scrupulously observe in your inspections every sign which tests the efficiency and purity of your lymph. Note every case wherein the vaccine vesicle is unduly hastened or otherwise irregular in its developement or wherein any undue local irritation arises, and if similar results ensue in other cases vaccinated with the same lymph, desist at once from employing it. Consider that your lymph ought to be changed if your cases at the usual time of inspection on the day week after vaccination show any conspicuous areola round their vesicle."

The 9th and last instruction is "Keep in good condition the lancets and other instruments which you

use for vaccinating, and do not use them for any other purpose whatever. When you vaccinate have water and a napkin at your side with which invariably to cleanse your instrument after one operation before proceeding to another. Never use an ivory point or capillary tube a second time."

Official return
of cause of
deaths from
vaccination.

The report of the Medical Officer of the Local Government Board in 1884, admitting the danger of careless vaccination, refers to 55 deaths from vaccination recorded in the Registrar General's Report and adds "they doubtless were for the most part erysipelas and their occurrence gives reason for *cleanliness of lancets, for avoidance of filthy vaccination shields and generally for care in vaccination.*" But he distinctly approves of vaccination. (Shaw's "Manual," pages 42-43.)

These sensible and authoritative directions prove that the Local Government Board does all that can be expected of a governing body in laying down the law. It is for magistrates to strongly discountenance any departure from it if they value the health of the community, and any person who calls attention to a systematic violation of these provisions would no doubt obtain the support of all officers of justice.

Searching examination
of each child obligatory.

A child's "febrile state" or otherwise may be judged by observation and the use of the clinical thermometer; but the condition of its bowels, and whether or not it has been exposed to infection will necessitate the questioning of the parent, and its entire freedom from eczema will require its thorough bodily examination. On the same principle that it is not obligatory to a parent to cause a child to be vaccinated unless he has had opportunities provided by the parish (Sect. 12, Vacc., Act., 1867) so is he not compelled to have it vaccinated until vaccination is carried out

in a proper manner as defined by the Local Government Board in the above Instructions.

This defence is not answered by the suggestion that on proper notice to the public vaccinator a parent may have his child vaccinated with calf instead of human lymph, and thus preserve it from human infection. An official letter of the Local Government Board, addressed to the Public Vaccinator of the Tunbridge Wells District, dated 1st July, 1895, (and in September to the Windsor Board of Guardians to the same effect), states that "The choice of lymph in an individual case of public vaccination is a matter as to which the Public Vaccinator alone has the responsibility. Parents bringing their children to a public vaccination station have no right to decide whether one or other form of lymph should be used. The present system of public vaccination in England is designed to secure as far as possible vaccination with fresh lymph from arm to arm. The Official Instruction to Vaccinators Under Contract contains (sect. 5) an express warning against departure from that system."

Calf lymph.

It may be impossible to test the carrying out of all these directions. Very important are the first and last of them. Neither a defendant or his wife can at present give evidence, except at the preliminary hearing under sect. 31, therefore after notice and before summons, let him with two friends who can be called as witnesses, go down with the child to the vaccination station, and quietly observe how the vaccinator performs the requirements of instructions 1 and 9. If they are not admitted into the vaccination room, inquiries should be made of persons as they come out who are willing to give evidence.

How to proceed

Uselessness of only selected cases being examined.

It is clearly useless for the Public Vaccinator to carry out the instructions in some cases and not in others, for as a chain is only as strong as its weakest link, so unless the sanitary chain is complete, infection may readily be spread, nor is it only doubtful cases, but all children must be thoroughly examined. Having seen several children vaccinated, the parent may, unless all the instructions of the L. G. B. are fulfilled, take the child away. When summoned, he or his representative should call his witnesses to the fact that the requirements of the Local Government Board are not carried out at the station in question, and that the defendant had expressed to them that this was a sufficient reason for not having his child vaccinated. It may be as well, though not obligatory, if, on returning from the vaccination station, he addresses a letter to the vaccination officer in these words, "I have received notice to take my child to the vaccination station of this district to be vaccinated, but having attended at the station, after observation and inquiry I am convinced that it would be dangerous to my child's health so to do." In support the portions of the Reports (No. 5 and *passim*) of the Royal Commission on Vaccination may be read so far as the probability of infection is concerned. The vaccination officer should be cross-examined as to what takes place at the vaccination station, and if he replies that he is not present, it should be pointed out to him that the Schedule to the General Order of October 31, 1874, on the duties of the vaccination officer prescribes (16), "He shall as far as possible attend the public vaccination stations during vaccinating hours." The public vaccinator should be approached, and notice given him of the day and time of hearing of the summons, and he should be asked if he will appear to give evidence. If he refuses, the

Vaccination officer to be present at station,

defendant should go before the magistrate and take oath to this effect, and that he verily believes the public vaccinator will not voluntarily appear as a witness, when a summons will be issued to compel him. In a case within my knowledge (February 18, 1895), after two witnesses had deposed that neither of the requirements 1 or 9 of the Instructions to Public Vaccinators were carried out, the public vaccinator put in no appearance, although there were repeated adjournments granted to enable him to do so, and the Board of Guardians officially called his attention to the evidence that had been given. In eight cases heard before Mr. De Rutzen, metropolitan police magistrate, counsel raised the point, which the magistrate stated would be a reasonable excuse if the inquiries had been made before the summons was issued. In other cases the point has been raised, and the summonses adjourned *sine die*. The above cases are mentioned here as significant indications of the sufficiency and possibility of this defence. To these remarks may be added that if a parent was ignorant of the fact that the public vaccinator was systematically vaccinating without due regard to the instructions imposed upon him, and his child subsequently suffered, there would be ground of action against the parish authorities for the negligence of their official, whether or not they had previous notice of the practice of their officer, and though the parent would not be able to allege any implied contract with him, yet he might obtain damages for the wrongful act. But if the parent, knowing of the systematic negligence of the public vaccinator, allowed his child, even under protest, to be vaccinated by him, I do not think he could sustain any action either against the parish or the public vaccinator. It is curious to note that Dr. Garrett Horder, in an essay read before the British

Remedy for
negligent vac-
cination.

Private vac-
cinator.

Medical Association (*British Medical Journal*, August 31, 1895), alleges that private vaccinators are inefficient, and proposes to take vaccination away from them, and place it in the hands of public vaccinators appointed by the Local Government Board, and to take them and vaccination officers out of the hands of boards of guardians altogether. Thus a medical despotism would be established, uncontrolled by any local authority whatever.

REGULATIONS AS TO DISTRESS.

DISTRESS.—The following regulations are enacted by the S.J. Act, 1879, 42 and 43 Vict. c. 49, sect. 43.—

Regulations as
to distress.

(1). A warrant of distress shall be executed by or under the direction of a constable.

(2). Unless the defendant consents, in writing, the sale must be by public auction; there must be five clear days between the making the distress and sale.

(3). The goods must be sold within the time fixed on the warrant, or if no period is fixed, then within 14 days. If the sum mentioned on the warrant and the charges are paid to the Clerk of the Court or to the Constable in charge of the warrant, any time before sale, the matter is at an end, but if he pays the Clerk of the Court he must produce the receipt to the Constable.

(4). Directions may be given on the warrant to remove the goods from the house till the day of sale. But unless these directions are given the goods must

not be removed except by consent of the defendant in writing. The warrant officer may, however, put a mark on goods of sufficient value in his opinion to satisfy the distress, and anyone removing goods so marked or the mark itself shall be liable to pay up to £5 on summary conviction.

(5). If the person charged with the execution of the warrant wilfully overcharge or retain any part of the price beyond his proper charge, he may be punished in the same manner.

(6). The person on whose goods the distress is made may inspect the account of the goods sold, charges &c., without any fee, on applying to the Clerk of the Court from whence the warrant issued, and may take a copy. Any surplus must be paid to the defendant.

The constable or officer who distrains must produce (not part with) the warrant at the request of the person on whose goods he distrains, and allow a copy to be taken, without fee. He must not break open outer locked or fastened doors unless the defendant has conveyed his goods to another house to prevent execution (re *Semayne*, 1 Smith's L. C. 115).

“The wearing apparel and bedding of a person and family are exempt from distress, and to the value of five pounds, the tools and implements of his trade (42 and 43 Vict., c. 49, s. 21).

The constable may make no charge for remaining in possession, for section 43 of the S.J. Act, 1879, provides for the impounding of sufficient goods, which it is his duty to seize (46 J.P. 812). For the same reason the section makes no provision for forcible re-entry, if, having entered he leaves the goods on the premises.

He may not make an excessive distress, nor, on the other hand, may he distrain on what appears to be of less value than the sum mentioned in the warrant, but must make return of "no sufficient distress." The same Justice making the warrant of distress may then issue a warrant committing the defendant to prison as an ordinary criminal, but not with hard labour (*Kennard v. Simmons*, 50 L.T. (N.S.) 28; 48 J.P. 551; 15 Cox Crim. Cases, 397.) The *interim* (5th) Report of the Royal Commissioners on Vaccination contains an unanimous recommendation for a change of the law.

If the defendant removes his goods to another locality or out of the jurisdiction, or has any goods elsewhere in the United Kingdom, any Justice of any other place shall, upon proof on oath of the handwriting of the Justice granting the warrant of distress, sign an indorsement on the warrant, and then it may be carried out either by the person bringing such warrant, or to whom it was originally directed, or by any constable of the County or place in which the magistrate backing the warrant has jurisdiction, and the goods may there be sold, subject to the above regulations. See sections 19, 20 and 21, S.J. Act, 1848.

REMEDY FOR EXCESSIVE DISTRRAINT OR IMPROPER RETURN.—This will be by action for damages against the constable. A constable is sometimes, not always, put on oath when making a return, and if he states what is grossly untrue he may also be prosecuted for perjury. If the defendant has been committed to prison on a return of *nulla bona*, an application may be made to release him on *habeas corpus* previous to action. An action against a constable should be brought in the High Court, and is subject to the provisions of the Public Authorities

Protection Act, 1893 (56 and 57 Vict., c. 61); which enacts *inter alia* that proceedings must be commenced within six months of offence, and opportunity offered the official of making pecuniary amends. (See also *re* Authers 53 J. P. 116; and S. J. Act, 1879, sect. 39, sub-sect. 4.)

AIDING AND ABETTING INFRACTION OF THE VACCINATION ACTS.—With the Vaccination Acts are expressly incorporated (section 33 of the Act of 1867) all the sections of the Summary Jurisdiction Act, 1848 (except section 11 which limits time for proceedings to within six months after offence). It is certainly open to the opponents of vaccination to comment upon the timidity with which the law is enforced. By section 5 of the S. J. Act, 1848, any person "Aiding and abetting, counselling and procuring the commission of any offence which is, or hereafter shall be punishable on summary conviction," is liable to the same penalty as the principal. Aiding and abetting is defined by Hawkins, J. (*R. v. Coney*, 51 L. J. M. C. 78), to be encouraging intentionally, by word or gesture, any one to break the law. This is done daily in respect to the Vaccination Laws, in the very face of magistrates, yet no one has been found bold enough to prosecute an aider or abettor, and it is idle, therefore, to indicate the defence. Every member of an anti-vaccination society might be prosecuted for conspiracy, but it is a maxim that custom rules the law, and the force of public opinion against what would be regarded as shameful persecution might sweep away such hold as the law of vaccination still possesses if it were carried out in its integrity. It remains to be seen how long half a law can be successfully administered.

Exceptional
position of
anti-vaccina-
tors.



